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No. 86-1746

In the Supreme Court of the United States

OCTOBER TERM, 1987

LINDA J. DARNELL (ROSE), ET AL., PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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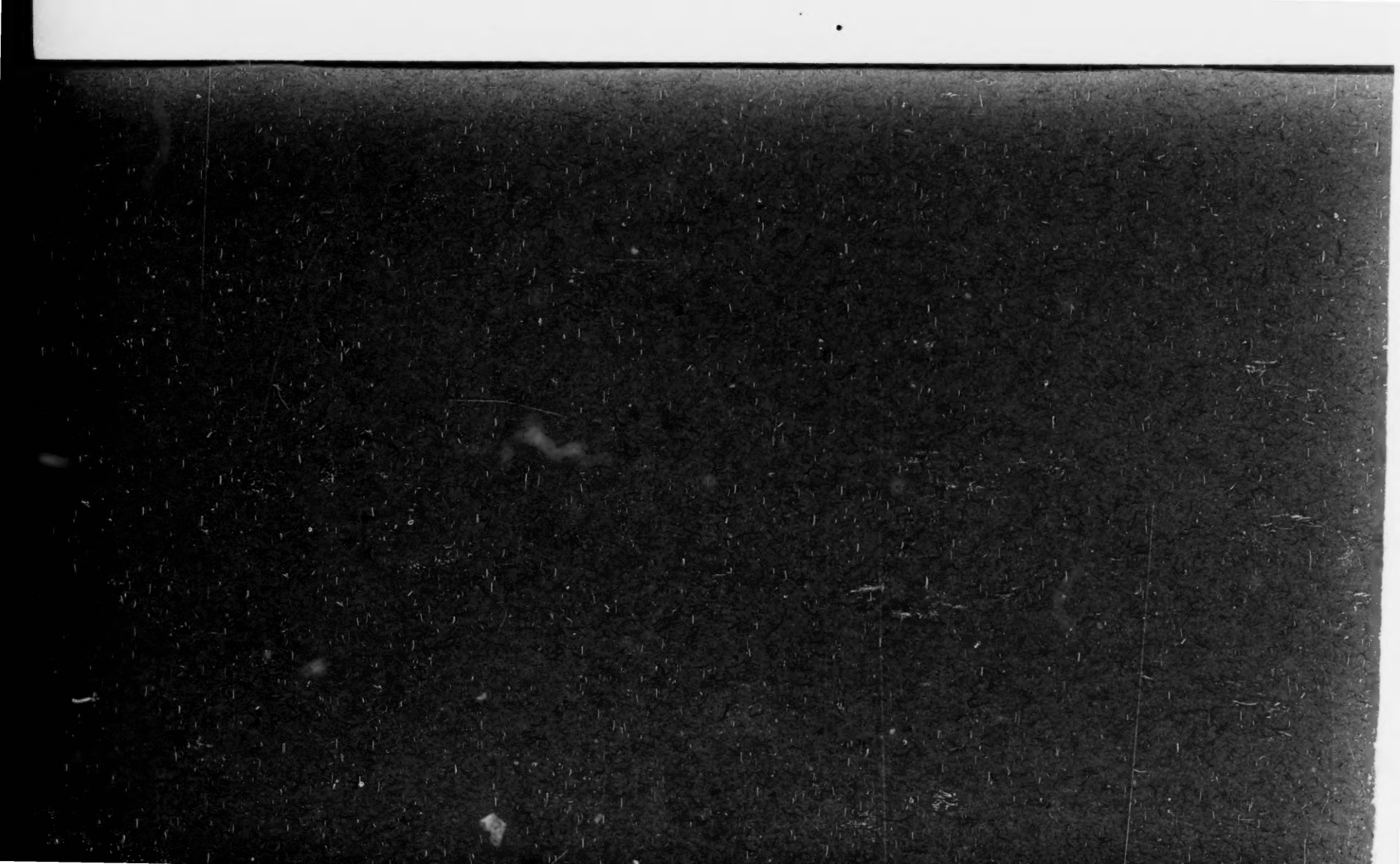

TABLE OF AUTHORITIES

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Petitioners contend that constitutionally inadequate pretermination procedures invalidated their dismissal from public employment.

1. a. Petitioners, former air traffic controllers, challenge their removal from federal employment following the air traffic controllers' strike in 1981. The background of the strike and the course of the subsequent litigation are set forth in our brief in opposition in *Campbell* v. *Department of Transportation, FAA*, cert. denied, 469 U.S. 881 (1984), one of a number of other cases arising out of the strike.[1] Petitioners received notices of proposed removal from the Federal Aviation Administration (FAA). The notices charged them with participating in the strike and notified them that they must send any reply to the charge within seven days of receiving the notice. Pet. App. 3a-4a, 33a-37a, 142a-145a; Pet. 7-8.

[1] A copy of our brief in *Campbell* has been sent to counsel for petitioners.

Petitioners worked at control towers in the Washington, D.C. area: either at Andrews Air Force Base, Camp Springs, Maryland, or at Washington National Airport. Although each notice of proposed termination was signed by the appropriate Tower Chief (the local supervisor), the return address on each was the FAA's regional office in New York City. Petitioners sent timely letters to the New York office requesting an extension of the reply deadline.[2] Because of the delay caused when petitioners mailed their requests to New York, their supervisors issued termination letters before petitioners' requests reached them. The termination letters noted that petitioners had made no oral or written reply to the charges. Several days later, however, after receiving the delayed requests for extensions, the appropriate Tower Chief sent a second letter to each petitioner. These letters referred to the delay but added: "[W]e have carefully considered your request and find no reason to alter our decision [to terminate you]." Pet. App. 49a-50a.[3]

b. All petitioners appealed to the Merit Systems Protection Board (MSPB) where the presiding officials upheld all the terminations. The presiding officials found that any error causing the late receipt of petitioners' replies was harmless because the Tower Chiefs had "reviewed the replies when they were finally received, and determined that there was nothing in them which would alter [their]

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[2] The Merit Systems Protection Board found that at least one of the petitioners, Richard E. Swauger, was "admittedly experienced in personnel matters" but "contributed to the confusion by sending his request to New York, rather [than] to his facility chief" (Pet. App. 119a).

[3] The record contains only the letter sent to petitioner Darnell; the presiding official of the Merit Systems Protection Board found that other petitioners had received identical letters indicating that their replies had been considered (Pet. App. 119a, 132a). Petitioners agree, as they have throughout this litigation, that all petitioners received the second letter. See Pet. 9-10.

decisions." Pet. App. 132a; see also *id.* at 119a. The presiding officials also found that petitioners had failed to demonstrate that had their Tower Chiefs received their initial replies on time, they would have granted extensions (Pet. App. 163a-164a).

The full Board affirmed the findings and conclusions of the presiding officials upholding the terminations. On review, the United States Court of Appeals for the Federal Circuit also affirmed. The court held in the lead case (*Darnell (Rose)* v. *Department of Transportation, FAA* (Pet. App. 1a-54a)) that the "perhaps premature" issuance of the removal letters was harmless error (*id.* at 11a).[4] The court found that the Tower Chief did consider petitioners' letters when they were received, that the letters "do not indicate that petitioners could or would have presented proof prior to the issuance of the removal letters that could have affected the FAA's factual conclusion that both petitioners participated in the strike" (*id.* at 10a), or suggest "that receipt of the replies prior to issuance of the removal letters could have affected the agency's underlying factual conclusion" (*id.* at 11a). The court of appeals also noted (*ibid.*) that petitioners had received a full post-termination hearing before the MSPB, where they failed to show any legal defense or other reason why they should not be terminated. The panel majority thus concluded that petitioners received the "meaningful opportunity to invoke the discretion of the decisionmaker" required by this Court's decision in *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 543 (1985). Senior Judge Cowen dissented, arguing that harmless error analysis was inapplicable to petitioners' due process claim and that, in any event, the error was not harmless (Pet. App. 13a-31a).

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[4] Relying on this decision, it sustained the removal of the other petitioners in unpublished opinions (Pet. App. 55a-70a).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other circuit. Further review is therefore unwarranted.

a. The court of appeals correctly held that petitioners were afforded an "opportunity to present [their] side of the story" before being terminated, as *Loudermill* requires (470 U.S. at 546). When the Tower Chiefs realized that petitioners had sent timely replies to the charges, they reviewed the replies and affirmed the terminations. Unlike *Loudermill*, where the employee simply received a termination notice to which he had no opportunity to reply, and the termination was made official a few days later, petitioners were invited to reply to the notice of the charges, and the Tower Chiefs considered petitioners' replies when they were eventually received.

Petitioners protest (Pet. 36-39) that they never intended their initial reply to be a full denial. But *Loudermill* does not give them a constitutional right to defer any substantive response to suit their own convenience. The Court there said, "[t]he essential requirements of due process * * * are notice and an opportunity to respond. * * * The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. * * * *To require more than this prior to termination woud intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee*" (470 U.S. at 546 (emphasis added)). Petitioners received both notice and an opportunity to respond, and they offered no sufficient reason why they should not be terminated. As the court of appeals found (Pet. App. 8a), if the agency erred at all, its errors "were not errors of constitutional dimension."[5]

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[5] In the lead air traffic controller cases, this Court declined to review the claim that procedural errors could not be deemed harmless. See *Campbell* v. *Department of Transportation, FAA*, 735 F.2d 497

In any event, unlike the employees in *Loudermill*, who had "plausible arguments to make that might have prevented their discharge" (470 U.S. at 544), petitioners, who have now received full de novo post-termination hearings before the MSPB, have not shown that their terminations "involved arguable issues" (*ibid.* (footnote omitted)).[6] In the absence of any substantive basis for challenging the termination, any error in the pretermination consideration of petitioners' claims was clearly harmless. See, *e.g.*, *Delaware* v. *Van Arsdall*, No. 84-1279 (Apr. 7, 1986); *United States* v. *Hasting*, 461 U.S. 499 (1983); *United States* v. *Mechanik*, No. 84-1640 (Feb. 25, 1986).

b. To the extent petitioners assert statutory claims (compare Pet. Question Presented with Pet. 17-19), they are equally meritless. Under the Civil Service Reform Act of 1978, an agency decision to remove an employee may be overturned if the employee shows "harmful error," 5 U.S.C. 7701(c)(2)—that is, one that might have affected the agency's conclusion, 5 C.F.R. 1201.56(c)(3). In language endorsed by this Court (see *Cornelius* v. *Nutt*, 472 U.S. 648, 658-659 & n.11 (1985)), the MSPB has required an employee to show it is "within the range of appreciable probability" that the agency might have decided

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(Fed. Cir.), cert. denied, 469 U.S. 881 (1984); *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984). The conclusion that purely procedural errors are necessarily harmful would be inconsistent with the provision of 5 U.S.C. 7701(c)(2(A) that an agency decision may be overturned only for a "harmful error" in procedures. *Adams* v. *Department of Transportation, FAA*, 735 F.2d 488, 495-496 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984).

[6] Although petitioners suggest (Pet. 28 & n.2) that petitioner Swauger's defense of "emotional incapacitation to work" might have prevailed at a pretermination hearing, the presiding official found that he had failed to rebut the agency's prima facie case of strike participation because he failed to explain his absence to the FAA at the time, and simultaneously participated in union activities (Pet. App. 213a-215a). The MSPB affirmed (*id.* at 110a-115a).

differently but for the error. *Parker* v. *Defense Logistics Agency*, 1 M.S.P.B. 489, 493 (1980). This Court has emphasized Congress's intent, in enacting the 1978 Act, that courts not prevent agencies from dealing expeditiously with erring employees simply because of " 'technical procedural oversights.' " *Nutt*, 472 U.S. at 662-663 & n.17 (citation omitted).

Petitioners have not even a colorable argument that the misdirection of their responses harmed them, in the absence of evidence (1) that their Tower Chiefs would have granted the extensions had they received the requests in time or (2) that they had some substantive defense to present. The grant or denial of the extensions was clearly a matter for the Tower Chiefs' discretion,[7] and petitioners offered no reason why they could not reply in a timely fashion to the straightforward charge of engaging in an illegal strike. Moreover, there is not the slightest evidence that petitioners could have presented any arguments on the merits other than those in the "standardized PATCO form 'reply' " (Pet. App. 10a) that they first sent to New York.

c. Petitioners misread the court of appeals' opinion and significantly overstate its reach. The court did not hold that if an employee "merely hints" that he opposes his removal in the course of seeking an extension, he has waived his right to reply (Pet. 25-26). Rather, the court

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[7] Petitioners cast their request for an extension as a legal argument (based on 5 U.S.C. 7513(b)) that they were entitled to a 30-day notice of their removal because the FAA did not have reasonable cause to believe that they had committed a crime for which imprisonment could be imposed. The Federal Circuit found this contention meritless in *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d at 486 (noting that 18 U.S.C. 1918 clearly makes participation in a strike against the government such a crime).

found that under the particular circumstances of this case, petitioners' initial replies disclosed no reason for the FAA to revisit its decisions. The court expressly noted (Pet. App. 10a) the insufficiency of petitioners' "standardized PATCO form 'reply,' " which stated merely that " 'there is no basis to the charge that I have committed a crime for which a sentence of imprisonment may be imposed.' "[8]

Both the court of appeals and the MSPB have had substantial experience with the delaying tactics of terminated air traffic controllers. The court rightly determined that it would not " 'force the Government to retain these erring employees solely in order to 'penalize the agency' for nonprejudicial procedural mistakes' " (Pet. App. 9a (quoting *Cornelius* v. *Nutt*, 472 U.S. at 663)).

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[8] Petitioners' claim of an intra-circuit conflict does not merit review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). There is, in any event, no such conflict. *Smith* v. *United States Postal Service*, 789 F.2d 1540 (Fed. Cir. 1986), upheld a termination even though the employee had received less than the statutorily required 30 days' notice (see note 7, *supra*). The agency in *Smith* never corrected its error as the FAA did here, yet the court still affirmed, emphasizing Congress's intent that technical errors alone should not prevent agencies from dealing expeditiously with errant employees. 789 F.2d at 1545 (citing *Cornelius* v. *Nutt*, 472 U.S. at 663 & n.17).

In *Mercer* v. *Dep't of Health & Human Services*, 772 F.2d 856 (Fed. Cir. 1985), as petitioners admit, the court found no denial of due process under *Loudermill* where the employee had an opportunity to reply (772 F.2d at 859). The court ruled that the agency's clear procedural error—flatly denying the employee a pretermination hearing explicitly required by agency regulations—was harmful, but only because the employee offered undisputed evidence of a difference of opinion within the agency that a hearing might have resolved in the employee's favor (*id.* at 859-860). The court held that the employee must produce evidence of harmful error even as to such a clear, serious procedural error as the denial of a hearing (*ibid.*). Here, as the court of appeals correctly held, petitioners have produced no such evidence.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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